

Office of the Secretary of Labor

§9.11

economy and efficiency to provide supplemental training to the predecessor's workers.

(iii) Factors the head of a contracting department or agency shall not consider in making an exemption determination (because consideration of such factors would contravene the Executive Order's purposes and findings) include whether the use of a carryover workforce, in general, would greatly increase disruption to the delivery of services during the period of transition between contracts; whether, in general, a carryover workforce would not be an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements; the job performance of the predecessor contractor; the seniority of the workforce; and the reconfiguration of the contract work by a successor contractor. The head of a contracting department or agency also shall not consider wage rates and fringe benefits of service employees in making an exemption determination except in the following exceptional circumstances:

(A) In emergency situations, such as a natural disaster or an act of war, that physically displace incumbent employees from the locations of the service contract work and make it impossible or impracticable to extend offers to hire as required by the Order;

(B) When a carryover workforce in its entirety would not constitute an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements but rather would require extensive training to learn new technology or processes that would not be required of a new workforce; or

(C) Other, similar circumstances in which the cost of employing a carryover workforce on the successor contract would be prohibitive.

(5) Any request by interested parties for reconsideration of a contracting department or agency head's determination to exercise its exemption authority under Section 4 of the Executive Order shall be directed to the head of the contracting department or agency.

(e) *Managerial and supervisory employees.* This part does not apply to employees who are managerial or super-

visory employees of Federal service contractors or subcontractors. *See* §9.2(9) of this part, definition of *managerial employee* and *supervisory employee*.

Subpart B—Requirements

§9.11 Contracting agency requirements.

(a) *Contract clause.* The contract clause set forth in Appendix A of this part shall be included in covered service contracts, and solicitations for such contracts, that succeed contracts for performance of the same or similar services at the same location.

(b) *Notice.* Where a contract will be awarded to a successor for the same or similar services to be performed at the same location, the Contracting Officer will ensure that the predecessor contractor provide written notice to service employees of the predecessor contractor of their possible right to an offer of employment. Such notice shall be either posted in a conspicuous place at the worksite or delivered to the employees individually. Where the predecessor contractor's workforce is comprised of a significant portion of workers who are not fluent in English, the notice shall be provided in both English and a language with which the employees are more familiar. Multiple foreign language notices are required where significant portions of the workforce speak different foreign languages and there is no common language. Contracting Officers may advise contractors to provide the notice set forth in appendix B to this part in either a physical posting at the job site, or another format that effectively provides individual notice such as individual paper notices or effective email notification to the affected employees. To be effective, email notification must result in an electronic delivery receipt or some other reliable confirmation that the intended recipient received the notice. Any particular determination of the adequacy of a notification, regardless of the method used, must be fact-dependent and made on a case-by-case basis.

(c) *Disclosures.* The Contracting Officer shall provide the incumbent contractor's list of employees referenced in §9.12(e) of this part to the successor

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contractor and, on request, to employees or their representatives.

(d) *Actions on complaints*—(1) *Reporting*. (i) *Reporting time frame*. Within 14 days of being contacted by the Wage and Hour Division, the Contracting Officer shall forward all information listed in paragraph (d)(1)(ii) of this section to the Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210.

(ii) *Report contents*: Except as provided by paragraph (d)(3) of this section, the Contracting Officer shall forward to the Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210 any:

(A) Complaint of contractor non-compliance with this part;

(B) Available statements by the employee or the contractor regarding the alleged violation;

(C) Evidence that a seniority list was issued by the predecessor and provided to the successor;

(D) A copy of the seniority list;

(E) Evidence that the nondisplacement contract clause was included in the contract or that the contract was exempted by the contracting agency;

(F) Information concerning known settlement negotiations between the parties, if applicable;

(G) Any other relevant facts known to the Contracting Officer or other information requested by the Wage and Hour Division.

(2) [Reserved]

§ 9.12 Contractor requirements and prerogatives.

(a) *General*—(1) *No employment openings prior to right of first refusal*. Except as provided under the exclusions listed in § 9.4 of this part or paragraphs (c) and (d) of this section, a successor contractor or subcontractor shall fill no employment openings under the contract prior to making good faith offers of employment (*i.e.*, a right of first refusal to employment on the contract), in positions for which the employees are qualified, to those employees employed under the predecessor contract whose employment will be terminated as a result of award of the contract or the expiration of the contract under

which the employees were hired. The contractor and its subcontractors shall make a bona fide, express offer of employment to a position for which the employee is qualified to each employee and shall state the time within which the employee must accept such offer, but in no case shall the period within which the employee must accept the offer of employment be less than 10 days.

(2) *No seniority list available*. The successor contractor's obligation to offer a right of first refusal exists even if the successor contractor has not been provided a list of the predecessor contractor's employees or the list does not contain the names of all persons employed during the final month of contract performance.

(3) *Determining eligibility*. While a person's entitlement to a job offer under this part usually will be based on whether he or she is named on the certified list of all service employees working under the predecessor's contract or subcontracts during the last month of contract performance, a contractor must also accept other credible evidence of an employee's entitlement to a job offer under this part. For example, even if a person's name does not appear on the list of employees on the predecessor contract, an employee's assertion of an assignment to work on a contract during the predecessor's last month of performance coupled with contracting agency staff verification could constitute credible evidence of an employee's entitlement to a job offer, as otherwise provided for in this part. Similarly, an employee could demonstrate eligibility by producing a paycheck stub identifying the work location and dates worked.

(b) *Method of job offer*—(1) *Bona-fide offer*. Except as otherwise provided in this part, a contractor must make a bona fide express offer of employment to each qualified employee on the predecessor contract before offering employment on the contract to any other person. In determining whether an employee is entitled to a bona fide, express offer of employment, a contractor may consider the exceptions set forth in paragraph (c) of this section and may utilize employment screening processes (*i.e.*, drug tests, background